SUPREME COURT OF THE UNITED STATES

CENTRAL STATE UNIVERSITY *v.* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, CENTRAL STATE UNIVERSITY CHAPTER

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

No. 98–1071. Decided March 22, 1999

JUSTICE STEVENS, dissenting.

While surveying the flood of law reviews that cross my desk, I have sometimes wondered whether law professors have any time to spend teaching their students about the law. Apparently, a majority of the legislators in Ohio had a similar reaction to the work product of faculty members in Ohio's several state universities. By enacting Ohio Rev. Code Ann. §3345.45 (1997), the legislators decided to do something about what they perceived to be a problem that neither the State Board of Regents nor the trustees of those universities could solve for themselves. Section 3345.45 directs that board and those trustees to develop standards and policies for instructional workloads for university faculty members. It provides that faculty members of public universities, unlike any other group of public employees, may not engage in collective bargaining about their workload.

How the intellectually gifted citizens of Ohio who have selected teaching as their profession shall allocate their professional endeavors between research and teaching is a matter of great importance to themselves, to their students, and to the consumers of their scholarly writing. Who shall decide how the balance between research and teaching shall be struck presents a similarly important question.

Prior to §3345.45, the faculty members' freedom to make such decisions was constrained only by the teaching or

research assignments imposed by their superiors in the educational establishment. By its enactment of §3345.45, the Ohio General Assembly has asserted an interest in playing a role in making these decisions. As a result of the filing of this lawsuit, first the Ohio courts and now this Court have also participated in this decisional process.

Buried beneath the legal arguments advanced in this case lies a debate over academic freedom. In my judgment the relevant sources of constraint on that freedom are (1) the self-discipline of the teacher, (2) her faculty or department supervisors, (3) the trustees of the university where she teaches, (4) the State Board of Regents, (5) the state legislature, (6) state judges, and, finally, (7) the Justices sitting on this Court. I omit any reference to the collective-bargaining representatives of the teachers because, as everyone agrees, there is no evidence that collective bargaining has had any effect on the increased emphasis on research over teaching that gave rise to the enactment of §3345.45.[1]

I have neither the mandate nor the inclination to assess

[1]After reviewing studies prepared by the Legislative Office of Education Oversight, by a Special Task Force on Challenges & Opportunities for Higher Education in Ohio, by the Regents' Advisory Committee on Faculty Workload Standards & Guidelines, by the Regents' Advisory Committee on Faculty Workload, and by the Ohio Board of Regents, as well statistical data collected from Ohio colleges and universities, the Ohio Supreme Court concluded:

"We have reviewed each of these reports [relied upon by Central State University], and all other evidence contained in the record, and can conclude with confidence that there is not a shred of evidence in the entire record which links collective bargaining with the decline in teaching over the last decade, or in any way purports to establish that collective bargaining contributed in the slightest to the lost faculty time devoted to undergraduate teaching. Indeed, these reports appear to indicate that factors other than collective bargaining are responsible for the decline in teaching activity." 83 Ohio St. 3d, 229, 236, 699 N. E. 2d 463, 469 (1998).

whether the decision of the Ohio General Assembly to enact §3345.45 was wise or unwise. I am equally convinced that this Court should not review the role played by the Ohio judiciary in deciding how to resolve this dispute. The case is important to the state universities in Ohio, but it has little, if any, national significance. Seven of the eleven Ohio judges who reviewed the case concluded that the Ohio statute violated the Ohio Constitution.[2] Indeed, the majority opinion of the Ohio Supreme Court did not cite a single case decided by this Court.

If the State Supreme Court did misconstrue the Equal Protection Clause of the Federal Constitution, the impact of that arguable error is of consequence only in the State of Ohio, and will, in any event, turn out to be totally harmless if that court adheres to its previously-announced interpretation of the State Constitution. I therefore believe that the Court should deny the petition for certiorari.

If the case does warrant this Court's review, it should not be decided summarily. It surely should not be disposed of simply by quoting descriptions of the rational-basis standard of review articulated in four non-unanimous opinions of this Court deciding wholly dissimilar issues. Cases applying the rational-basis test have

[2]The seven judges include the four from the majority opinion of the State Supreme Court and the three judges of the Court of Appeals who originally struck down §3345.45.

The State Supreme Court held that the statute violated Article I, §2, of the Ohio Constitution, which provides:

"All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly." The Court found it unnecessary to consider respondent's additional arguments based, in part, on other provisions of the State Constitution. Id., at 237, 699 N. E. 2d, at 470.

described that standard in various ways. Compare, *e.g.*, the Court's opinions in *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920), and *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 446 (1985), with the majority opinion in *Railroad Retirement Bd.* v. *Fritz*, 449 U. S. 166, 174–177 (1980). Indeed, in the latter case there were three opinions, each of which formulated the rational basis standard differently from the other two. *Ibid.*, (majority opinion); *id.*, at 180–181 (STEVENS, J., concurring in the judgment); *id.*, at 183–184 (BRENNAN, J., dissenting).[3]

The Court's disposition of this case seems to assume that an incantation of the rational-basis test, together with speculation that collective bargaining might interfere with the adoption of uniform faculty workload policies, makes it unnecessary to consider any other facts or arguments that might inform an exercise of judgment about the underlying issue. While I am not prepared to express an opinion about the ultimate merits of the case, I can identify a serious flaw in the Court's mechanistic analysis. The Court assumes that the question improperly answered by the Ohio Supreme Court is whether collective bargaining may interfere with the attainment of a uniform workload policy.[4] But that is not the issue, because this

[3]In a footnote to the opinion in *Fritz* that cited a number of rational-basis cases, the Court made this observation:

"The most arrogant legal scholar would not claim that all of these cases applied a uniform or consistent test under equal protection principles. And realistically speaking, we can be no more certain that this opinion will remain undisturbed than were those who joined the opinion in *Lindsley*, [v. *Natural Carbonic Gas Co.*, 220 U. S. 61 (1911)], [F. S.] *Royster Guano Co.*, v. *Virginia*, 253 U. S. 412 (1920), or any of the other cases referred to in this opinion and in the dissenting opinion." 449 U. S., at 176–177, n. 10.

[4]In addition, the Court's opinion assumes that the ultimate objective of having teachers spend more time in classrooms requires that there be a single workload policy for each of the State's universities and for each of the subjects taught in those schools, whether Latin, medicine, or astrophysics. I am not at all sure that such an assumption is rational.

case involves the Equal Protection Clause, and not the principles of substantive due process.

The question posed by this case is whether there is a rational basis for discriminating against faculty members by depriving them of bargaining assistance that is available to all other public employees in the State of Ohio.[5] Even the Court's speculation about the possible adverse consequences of collective bargaining about faculty workload does not explain why collective bargaining about the workloads of all other public employees might not give rise to the same adverse consequences arising from lack of state-wide uniformity. Indeed, I would suppose that the interest in protecting the academic freedom of university faculty members might provide a rational basis for giving them *more* bargaining assistance than other public employees. In any event, no one has explained why there is a rational basis for concluding that they should receive *less*.

I respectfully dissent.

[5] Ohio Rev. Code Ann. 4117.03(A)(4) (1998) provides: "Public employees have the right to: . . . Bargain collectively with their public employers to determine wages, hours, terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement, and enter into collective bargaining agreements. . . ."